



CENTER FOR
FOOD SAFETY

June 14, 2016

SENT VIA Online Submission Form

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460

RE: Freedom of Information Act Request – EPA’s Data Evaluation Records for submitted honey bee studies – Clothianidin and Thiamethoxam

To the National Freedom of Information Officer:

The Center for Food Safety (CFS) is a 501(c)(3) nonprofit organization that addresses the impacts of our current industrial food production system on human health, animal welfare, and the environment. Consistent with this mission and pursuant to 40 C.F.R. Part 2 and the Freedom of Information Act, 5 U.S.C. § 552, I, Larissa Walker, on behalf of CFS, respectfully request the following information, related to neonicotinoid insecticide Registration Reviews and likely to be within the Office of Pesticide Programs (OPP):

Any and all EPA Data Evaluation Records (DERs) or other reviews for Tier II honey bee studies that were submitted to EPA for Clothianidin by Bayer CropScience and for Thiamethoxam by Syngenta. EPA previously provided both of those studies in full via a 4/28/16 CD-ROM in response to CFS’ FOIA of 3/7/16, with EPA reference number EPA-HQ-2016-0046. Please do not send those studies again; only send the reviews of them, as follows:

A) The Bayer CropScience honey bee feeding study for **Clothianidin**, entitled:

Colony feeding study evaluating the chronic effects of clothianidin-fortified sugar diet on honey bee {Apis mellifera} colony health under free foraging conditions

- *Final Report* - by Bayer CropScience, EPA date stamped 2-11-16

Provide all EPA DERs or other reviews for that submitted study.

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B) The Syngenta honey bee feeding study for **thiamethoxam**, entitled:

Thiamethoxam Technical
Thiamethoxam Technical - Honey Bee Brood and Colony
Level Effects Following Thiamethoxam Intake via Treated
Sucrose Solution in a Field Study in North Carolina
Final Report - by Syngenta, EPA date stamped 11-03-15

Provide all EPA DERs or other reviews for that submitted study.

C) **Also, provide all documents of any kind whatsoever in EPA's possession that refer to any DERs or other internal reviews for the above 2 studies.**

"All documents" includes, but is not limited to, all meeting agenda, minutes, attendee lists, email, notifications, agreements, contracts, correspondence, memoranda, plans, reports, databases, and notes. This request includes all documents that have ever been within your custody or control, whether they exist in agency "working," investigative, retired, electronic mail, or other files currently or at any other time.

CFS requests this information in light of the President's "Memorandum for the Heads of Executive Departments and Agencies" dated January 21, 2009, which states:

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails...In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA. The presumption of disclosure also means that agencies should take affirmative steps to make information public.

Exec. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4,683 (Jan. 21, 2009). This request is being sent to the EPA National FOIA officer with the understanding that it will be forwarded to other officers, offices, or departments with information pertinent to this request.

REQUEST FOR FEE WAIVER

CFS requests that pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), EPA waive all fees in connection with the procurement of this information. As demonstrated below, the nature of this request meets the test for fee waiver as expressed in the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(A)(iii).

Federal courts have found that the interaction of private interests, like pesticide companies, and agencies is a question of “utmost importance” in terms of FOIA. *See Natural Res. Def. Council, Inc. v. U.S. EPA (NRDC)*, 581 F. Supp. 2d 491, 498 (S.D.N.Y. 2008) (citing agreement in *Forest Guardians v. U.S. Dep’t of Interior*, 416 F.3d 1173, 1179 (10th Cir. 2005); *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1313-14 (D.C. Cir. 2003)). In *NRDC* the environmental nonprofit had requested information about EPA’s health review of pesticides and how the agency relied on information provided by pesticide companies. 581 F. Supp. 2d at 499. Though the nonprofit could not speak to what it would do with data once it received it, the court found: “disclosure of the information it seeks is likely to contribute significantly to the public’s understanding of the EPA’s decisionmaking process and the role, if any, played by outside groups in that process.” *Id.* The *NRDC* court found the fee waiver warranted. *Id.*

The factors EPA must consider in deciding upon a fee waiver request are laid out in 40 C.F.R. § 2.107(l), and those relating to a significant contribution to public understanding of the operations or activities of the government can be summarized as follows:

- (1) Whether the subject matter of the request involves issues that will significantly contribute to the public understanding of the operations or activities of the Agency.
- (2) Whether the contents of the records to be disclosed have an informative value.
- (3) Whether the disclosure of the information will likely contribute to an understanding of the subject by the general public.
- (4) Whether the contribution to public understanding is significant.

40 C.F.R. § 2.107(l). These factors are to be balanced against one another; no one factor is determinative. *See Friends of the Coast Fork v. U.S. Dep’t of Interior*, 110 F.3d 53, 55 (9th Cir. 1997).

The other requirements in the regulations—related to whether the requester has a commercial interest that outweighs a public interest motivation—are not applicable to CFS and this request. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See, e.g.*, OMB Fee Guidelines, 52 Fed. Reg. 10017-18; *see also* 40 C.F.R. § 2.107(b)(1). Such interests are not present in this request. CFS does not seek information from EPA for commercial gain or interest. As a 501(c)(3) nonprofit organization, CFS has no commercial interest in EPA’s involvement in these studies.

In deciding whether the fee waiver criteria are satisfied, CFS respectfully reminds EPA that FOIA is inclined toward disclosure and that the fee waiver amendments were enacted to

allow further disclosure to nonprofit, public interest organizations. *See* 132 Cong. Rec. S. 14270-01, (statement of Sen. Leahy) (“[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information.”). Furthermore, the Ninth Circuit Court of Appeals has interpreted this fee waiver section broadly, holding that the section “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy).

I. The present disclosure is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.

The requested disclosure will contribute to public understanding of the operations or activities of the government. 5 U.S.C. § 552(a)(4)(A)(iii).

A. The request concerns identifiable “operations or activities of the government.” (40 C.F.R. § 2.107(l)(2)(i)).

The requested information pertains to EPA’s involvement in the risk assessments and registration of clothianidin and thiamethoxam. It is irrefutable that EPA’s regulatory control over pesticide registrations is a clearly identifiable operation of the government. This disclosure will demonstrate to the public at large the nature of EPA’s involvement in these pesticides.

B. The disclosure is “likely to contribute to an understanding of Federal government operations or activities” (40 C.F.R. § 2.107(l)(2)(ii)).

As discussed in the previous section, the present disclosure will provide the public a better understanding of the nature of EPA’s involvement with clothianidin and thiamethoxam. CFS is a nonprofit organization that informs, educates and counsels the public—via legal action, our website, our True Food Network, books and reports, and our quarterly newsletter, *Food Safety Now!*—on the harm done to human health, animal welfare, and the environment by industrial agriculture. Accordingly, CFS is an effective vehicle to disseminate information on pesticide use and its impact on the environment.

Simultaneously, this FOIA will help CFS fulfill its well-established function of public oversight of government action. Public oversight of agency action in particular is a vital component in our democratic system and is the bedrock upon which FOIA stands.

C. The disclosure will contribute to the understanding of a “reasonably broad audience of persons interested in the subject” (40 C.F.R. § 2.107(l)(2)(iii)).

CFS is a member-oriented organization with over 700,000 members that works to address the impacts of the food system on human health, animal welfare, and the environment. Through over a decade of involvement in environmental litigation and policymaking as it relates to food, CFS has demonstrated its ability to take technical information provided by government agencies

and distill it into a format that is accessible to the public. CFS employs science and policy experts¹ who have analyzed FOIA, NEPA, and other environmental and scientific reports for their entire careers. CFS puts out reports on pesticides, genetically engineered foods, food and feed additives, and other topics that tend to be difficult for the layperson to understand without professional assistance.² CFS has made comments to EPA on the potential catastrophic effects of increased use of the neonicotinoid insecticides. CFS also facilitates members' ability to confront agency inaction, such as the hundreds of thousands of citizens who petitioned EPA to act upon a CFS formal petition and adopt emergency measures to slow the spread of colony-collapse disorder in honey bees.³ Most recently, CFS delivered to EPA a petition with over half a million signatures urging EPA to follow the European Union's lead in recognizing the risk of neonicotinoid pesticides.⁴

Federal courts have found that dissemination to 2,500 people through a newsletter and the intent to start a website is sufficient to meet the "reasonably broad audience" factor. *Forest Guardians v. U.S. Dep't of Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005). Moreover, they have found that the proven ability to digest and disseminate highly technical information, as demonstrated by past analysis and dissemination, merits giving nonprofit organizations fee waivers. *See W. Watersheds Project v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004). CFS's activity in these respects far outstrips any minimums established by judicial interpretation.

II. Obtaining the information is of no commercial interest to CFS (40 C.F.R. § 2.107(l)(3)).

CFS is a 501(c)(3) nonprofit environmental advocacy organization that works to address the impacts of our food production system on human health, animal welfare, and the environment. CFS works to achieve its goals through grassroots campaigns, public education, media outreach, and litigation. Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See, e.g.*, OMB Fee Guidelines, 52 Fed. Reg. 10017-18. Such interests are not present in this request. In no manner does CFS seek information from the EPA for commercial gain or interest. CFS respectfully files this FOIA request pursuant to its goal of educating the general public on the adverse effects of industrial agriculture. Upon request and free of charge, CFS will provide members of the public with relevant information obtained from EPA.

Based upon the foregoing, CFS requests that this FOIA be classified within EPA's fee waiver category and that EPA send the requested information as required by law. As this is a

¹ See Leadership, Center for Food Safety, <http://www.centerforfoodsafety.org/staff> (last visited June 24, 2014).

² See Publications & Resources, Center for Food Safety, <http://www.centerforfoodsafety.org/reports> (last visited June 24, 2014).

³ See Press Release, Center for Food Safety, 250,000+ to EPA: Time for Emergency Action on Pesticide to Protect Bees (June 28, 2012), <http://centerforfoodsafety.com/press-releases/713/250000-to-epa-time-for-emergency-action-on-pesticide-to-protect-bees>.

⁴ See Press Release, Center for Food Safety, Half a Million Demand Action from EPA to Save Bees (Mar. 21, 2014), <http://centerforfoodsafety.com/issues/304/pollinators-and-pesticides/press-releases/2995/half-a-million-demand-action-from-epa-to-save-bees>.

matter of extreme importance to CFS, we look forward to your reply within twenty working days as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). If the responsive records are voluminous, please contact us to discuss the proper scope of the response. If any exemption from FOIA's disclosure requirement is claimed, please describe in writing the general nature of the document and the particular legal basis upon which the exemption is claimed. Should any document be redacted, please indicate the location of the redaction through the use of black ink. Please provide any and all non-exempt portions of any document that may be partially exempt due to some privilege as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

Please send all materials to the Washington, D.C. address on the letterhead. Please call me at (202) 547-9359 or email LWalker@centerforfoodsafety.org if you have any further questions about this request. Thank you for your attention to this request.

Sincerely,

/s/

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